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UNITED STATES DISTRICT COURT

FOR THE CENTRAL DISTRICT OF CALIFORNIA

MUTUAL PHARMACEUTICAL  
COMPANY, INC., et al.,

Plaintiffs,

v.

WATSON PHARMACEUTICALS,  
INC., et al.,

Defendants.

WEST-WARD PHARMACEUTICAL  
CORP., a Delaware corporation,

Counterclaimant,

v.

MUTUAL PHARMACEUTICAL  
COMPANY, INC., a Pennsylvania  
corporation; AR SCIENTIFIC, INC., a  
Delaware corporation; and AR  
HOLDING COMPANY, INC., a  
Delaware corporation,

Counterdefendants.

Case No. CV 09-05700 PA (RZx)  
*Related to:* CV 09-05761 PA (RZx)  
Honorable Percy Anderson

**MEMORANDUM OF POINTS  
AND AUTHORITIES IN  
SUPPORT OF PLAINTIFFS'  
MOTION TO (1) DISMISS WEST-  
WARD'S COUNTERCLAIM, OR  
IN THE ALTERNATIVE, STRIKE  
PORTIONS THEREOF, AND (2)  
STRIKE WEST-WARD'S  
EIGHTEENTH AFFIRMATIVE  
DEFENSE**

**Time: 1:30 p.m.  
Date: November 2, 2009  
Courtroom No. 15**

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## I. INTRODUCTION

West-ward Pharmaceutical Corp.'s ("West-ward") counterclaim for intentional interference with contractual relations does not identify a single third party or contract with which counterdefendants Mutual Pharmaceutical Company, Inc., AR Scientific, Inc. and AR Holding Company, Inc. (collectively, "Mutual") allegedly interfered. Nor does West-ward allege Mutual's knowledge of *any* of West-ward's contracts. As such, it is not surprising that there are no facts pled showing how Mutual's conduct caused an actual breach or disruption of any contractual relationship.

Knowing that it will, as a result of this action, soon be forced to halt its unlawful advertising and promotion of its unapproved colchicine products, West-ward's counterclaim is a transparent effort to turn the tables on Mutual. In doing so, West-ward does not come close to pleading the required elements of its purported interference claims. Instead of, for example, identifying the specific contractual relationships at issue and the parties to them, or specifying how such contractual relations have been actually impaired, West-ward meekly points to "various contractual relationships" and then tries to bolster its defense to Mutual's claims by citing irrelevant, immaterial and inflammatory matters.

Because West-ward has failed to plead the essential elements of a claim for intentional interference with contractual relations, its counterclaim should be dismissed. Additionally, paragraphs 13 and 14 of West-ward's counterclaim and its Eighteenth Affirmative Defense in its answer should be stricken.

## II. STATEMENT OF FACTS

Mutual is the only manufacturer approved by the Food and Drug Administration ("FDA") to manufacture and market products containing colchicine as the single active ingredient.<sup>1</sup> Despite this, West-ward continues to illegally

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<sup>1</sup> The FDA has approved another drug product containing probenecid and colchicine in a fixed combination, but Mutual is the only company with FDA approval for a drug containing colchicine as the sole active ingredient. For purposes of convenience, the term "colchicine products" as used herein shall refer only to drug products containing colchicine as the sole active ingredient.

1 market, advertise and promote colchicine products that include improper dosing  
2 guidelines and fail to warn consumers about potentially serious drug-drug  
3 interactions. As alleged in Mutual's complaint, West-ward's continued advertising  
4 and marketing practices are causing consumer confusion and ongoing irreparable  
5 harm to Mutual.

6 In response, West-ward filed a counterclaim for intentional interference with  
7 contractual relations against Mutual. West-ward's counterclaim does not identify a  
8 single party or contract with which Mutual allegedly interfered, but rather provides  
9 the vague and generalized allegation that Westward "has valid contractual  
10 relationships with various purchasers of prescription drugs, including pharmacies  
11 and wholesale purchasers." Counterclaim at ¶ 17. The counterclaim does not  
12 allege that Mutual had knowledge of any specific contractual relationship between  
13 West-ward and any third party, and does not describe the way in which Mutual's  
14 actions allegedly caused an actual breach or disruption of any contractual  
15 relationship. It further includes immaterial and irrelevant allegations about  
16 Mutual's manufacturing practices in an attempt to prejudice Mutual.

17 West-ward also answered Mutual's complaint and raised the purported  
18 affirmative defense of "behavior antithetical to acceptable commercial practice."  
19 Answer at 20:19-20. West-ward's Answer provided five paragraphs in support of  
20 this defense which make further allegations about Mutual's manufacturing practices  
21 and alleged anti-competitive behavior.

### 22 **III. LEGAL STANDARD**

23 Upon motion, a complaint may be dismissed when a plaintiff's allegations  
24 fail to state a claim upon which relief can be granted. Fed. R. Civ. P. 12(b)(6)  
25 (2007). "When considering a motion to dismiss under Rule 12(b)(6), the plaintiff's  
26 complaint is liberally construed and all well-pleaded facts are taken as true."  
27 *Infuturia Global, Ltd. v. Sequus Pharm., Inc.*, No. C 08-4871, 2009 U.S. Dist.  
28 LEXIS 13570, at \*7 (N.D. Cal. Feb. 23, 2009).

1 “To survive a motion to dismiss, a complaint must contain sufficient factual  
2 matter, accepted as true, to state a claim to relief that is plausible on its face.”  
3 *Ashcroft v. Iqbal*, 129 S.Ct. 1937, 1949 (2009) (internal quotations omitted). “A  
4 claim has facial plausibility when the plaintiff pleads factual content that allows the  
5 court to draw the reasonable inference that the defendant is liable for the  
6 misconduct alleged.” *Id.*

7 West-ward’s counterclaim does not comply with the notice pleading standard  
8 of Fed. R. Civ. P. 8(a)(2), which requires a “short and plain statement of the claim  
9 showing that the pleader is entitled to relief” in order to “give the defendant fair  
10 notice of what the ... claim is and the grounds upon which it rests.” *Bell Atl. Corp.*  
11 *v. Twombly*, 550 U.S. 544, 555 (2007).

#### 12 **IV. ARGUMENT**

##### 13 **A. West-ward Fails to State a Claim for Intentional Interference with** 14 **Contractual Relations.**

15 In order to state a claim for intentional interference with contractual relations,  
16 West-ward must plead:

17 “(1) a valid contract between [West-ward] and a third party; (2)  
18 [Mutual’s] knowledge of this contract; (3) [Mutual’s] intentional acts  
19 designed to induce a breach or disruption of the contractual  
20 relationship; (4) actual breach or disruption of the contractual  
21 relationship; and (5) resulting damage.”

22 *Pacific Gas & Electric Co., v. Bear Stearns & Co.*, 50 Cal.3d 1118, 1126 (1990).  
23 West-ward fails to plead the first, second and fourth elements of this cause of  
24 action, and therefore its claim should be dismissed under Federal Rule of Civil  
25 Procedure 12(b)(6).

1                   **1. West-ward Fails to Adequately Plead a Valid Contract**  
2                   **Between West-ward and a Third Party.**

3           It is axiomatic that West-ward cannot properly plead the first element of  
4 intentional interference with contractual relations—the existence of a valid contract  
5 between itself and a third party—without first identifying the contract that was  
6 allegedly interfered with and the parties thereto. *See Kentmaster Mfg. Co. v. Jarvis*  
7 *Prods. Corp.*, 146 F. 3d 691, 694-95 (9th Cir. 1998) (affirming dismissal of  
8 intentional interference with contractual relations claim where plaintiff generally  
9 alleged interference with “its contracts with slaughterhouses,” but did not “identify  
10 any ... contracts”); *see also In re Charles Schwab Corp. Secs. Litig.*, 257 F.R.D.  
11 534, 552 (N.D. Cal. 2009) (dismissing claim for intentional interference with  
12 contractual relations because the “complaint never identifie[d] the parties to the  
13 alleged contract”); *UMG Recs., Inc. v. Norwalk Distributors, Inc.*, No. SACV 02-  
14 1188, 2003 U.S. Dist. LEXIS 26303, at \*7 (N.D. Cal. June 12, 2003) (“Norwalk  
15 does not identify any specific contract in its counterclaim, instead referring to  
16 ‘various valid contracts.’ Accordingly Norwalk’s counterclaim for intentional  
17 interference with contractual relations is hereby DISMISSED.”) (emphasis in  
18 original); *Accuimage Diagnostics Corp. v. Terarecon, Inc.*, 260 F. Supp. 2d 941,  
19 956 (N.D. Cal. 2003) (dismissing claim for intentional interference with contractual  
20 relations because plaintiff made only “conclusory allegations that valid ‘contracts’  
21 exist[ed] between itself and an unspecified third party”); *Brown v. Allstate Ins. Co.*,  
22 17 F. Supp. 2d 1134, 1140 (dismissing claim for intentional interference with  
23 prospective economic advantage where plaintiff ‘fail[ed] to identify any specific  
24 existing relationships with which [defendant] tortiously interfered”) (S.D. Cal.  
25 1998); *SAP Am. v. Kensington & Taylor*, No. CV 96-1327, 1997 U.S. Dist. LEXIS  
26 24125, at \*24-25 (C.D. Cal. Feb. 10, 1997) (dismissing counterclaim where  
27  
28

1 counterclaimant alleged only that it “had valid and existing contracts with  
2 customers”).<sup>2</sup>

3 Here, as noted, West-ward does not identify a single entity or contract with  
4 which Mutual allegedly interfered. The sole charging allegation is that West-ward  
5 “has valid contractual relationships with various purchasers of prescription drugs,  
6 including pharmacies and wholesale purchasers.” Counterclaim at ¶ 17. West-  
7 ward’s naked assertion that it “has contractual relationships with various  
8 purchasers” (*id*) leaves open many questions necessary for the Court to determine  
9 whether its counterclaim is “plausible on its face.” *Iqbal*, 129 S.Ct. at 1949. For  
10 example: Does West-ward allege that Mutual interfered with *all* West-ward’s  
11 contractual relationships with purchasers of prescription drugs? Are the parties  
12 West-ward allegedly contracted with the same parties which Mutual allegedly made  
13 false statements to? Do the contracts West-ward alleges even involve the sale of  
14 colchicine? What are the terms of the alleged contracts and in what way did  
15 Mutual’s conduct cause an actual breach or disruption? Did Mutual have any  
16 privity with West-ward’s alleged contractual partners?

17 The counterclaim provides no answers to these questions. Absent allegations  
18 as to which contracts are at issue, the identities of the contracting parties that  
19 allegedly have been the subject of the interference, and how and in what way the

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20  
21 <sup>2</sup> These cases should be distinguished from cases where the plaintiff alleged that  
22 defendant interfered with *all* of its customers or contracts. In such cases, courts have  
23 allowed more generalized pleading of the existence of a contract because the third parties  
24 allegedly interfered with are clearly defined. *See Qwest Commc’ns Corp. v. Herakles,*  
25 *LLC*, No. 2:07-cv-00393, 2008 U.S. Dist. LEXIS 22154, at \*31 (E.D. Cal. Mar. 20, 2008)  
26 (finding that plaintiff properly pled the existence of a contract by reference to the “discrete  
27 group of third parties with which [plaintiff] had already contracted”); *Silicon Image, Inc.*  
28 *v. Analogix Semiconductor, Inc.*, No. C-07-0635, 2007 U.S. Dist. LEXIS 39599, at \*11  
(N.D. Cal. May 16, 2007) (finding that plaintiff properly pled the existence of a contract  
where plaintiff alleged that defendant interfered with the Software License Agreements  
necessarily in place between plaintiff and all its customers); *Lee v. General Nutrition*  
*Cos.*, CV 00-13550, 2001 U.S. Dist. LEXIS 24739, at \*34 (C.D. Cal. Nov. 26, 2001)  
(finding that plaintiff properly pled the existence of a contract where plaintiff alleged that  
defendant’s actions, including among other things, placing a competing store within close  
proximity of plaintiff’s location, interfered with plaintiff’s contracts with all its  
customers).

1 contractual relationships have been actually impaired or disrupted by Mutual, West-  
2 ward's counterclaim cannot proceed. Such elementary facts are required to "give  
3 [Mutual] fair notice of what the ... claim is and the grounds upon which it rests."  
4 *Twombly*, 550 U.S. at 555. Absent that specificity, West-ward has not pled enough  
5 "factual content [to] allow[] the court to draw the reasonable inference that  
6 [Mutual] is liable for the misconduct alleged." *Iqbal*, 129 S.Ct. 1937, 1949.

7 **2. West-ward Does Not Allege That Mutual Had Knowledge of**  
8 **Any of West-ward's Contracts.**

9 Additionally, West-ward's counterclaim fails to allege the required element  
10 that Mutual had knowledge of the (here, unspecified) contract(s) with which Mutual  
11 allegedly interfered. *See Pacific Gas & Electric Co., v. Bear Stearns & Co.*, 50  
12 Cal.3d at 1126; *see also Sequus Pharm., Inc.*, 2009 U.S. Dist. LEXIS 13570, at \*14  
13 (Ordering plaintiff "to allege facts to show that [defendant] knew of [plaintiff's]  
14 contractual relationship").

15 The closest West-ward comes to pleading this element is its allegation that  
16 "Mutual knew that its misrepresentations would be substantially certain to interfere  
17 with West-ward's existing business relationships." Counterclaim at ¶ 23.  
18 However, it does not follow from this allegation that Mutual knew of the existence  
19 of any *contracts* between West-ward and any third parties. West-ward merely  
20 alleges that Mutual knew of West-ward's "business relationships." Indeed, West-  
21 ward says nothing more than that Mutual was aware that West-ward had customers  
22 who bought West-ward's products. This generalized assertion does not provide the  
23 required level of actual knowledge of a specified contractual relationship (for the  
24 purchase or sale of colchicine products, for example) for purposes of making out  
25 the intentional tort of interference with contractual relations.

1                   **3. West-ward Does Not Allege That Mutual Caused a Breach**  
2                   **or Disruption of Any Contractual Relationship.**

3                   Finally, West-ward does not allege that Mutual's conduct caused an actual  
4                   breach or disruption of any contractual relationship. *See Pacific Gas & Electric*  
5                   *Co.*, 50 Cal.3d at 1126; *see also Sequus Pharm., Inc.*, 2009 U.S. Dist. LEXIS

6                   13570, at \*14 (Ordering plaintiff "to allege facts to show that [defendant] ...

7                   disrupt[ed] [plaintiff's] contractual relationship"). West-ward alleges only that

8                   "Mutual's actions have induced medical professionals, pharmacists and other

9                   purchasers of colchicine tablets not to prescribe, recommend or purchase West-

10                  ward's [colchicine] tablets." Counterclaim at ¶ 24. However, since West-ward has

11                  failed to identify a single contract, let alone the nature of such a contract anywhere

12                  in its counterclaim, it is impossible to determine whether (and how) Mutual's

13                  alleged conduct could plausibly constitute disruption of a contract.

14                  To the contrary, West-ward actually pleads that it "has valid contractual

15                  relationships with various purchasers of prescription drugs." Counterclaim at ¶ 28

16                  (emphasis added). Given that West-ward still "has" these purported contractual

17                  relationships, it is not at all clear what Mutual had done to cause such relationships

18                  to be actually disrupted. *See SAP Am.*, 1997 U.S. Dist. LEXIS 24125, at \*25 ("If

19                  the list contains the names of 'existing' customers, then it is difficult to understand

20                  what contract has been lost or disrupted by [the] alleged interference and more

21                  clarification is needed in this regard.") (emphasis added); *see also Katzenbach v.*

22                  *Grant*, 1:04-cv-6501, 2005 U.S. Dist. LEXIS 46756, at \*46 (E.D. Cal. June 7,

23                  2005) (dismissing claim for intentional interference with contractual relations

24                  because "[p]laintiffs ... [did] not allege[] an actual breach of the alleged contractual

25                  relationship, and in fact allege[d] the opposite when they assert[ed] that 'said

26                  project with [the third parties] is currently, as of the date of [the] complaint ... in

27                  development'").

28

1           **B. West-ward's Immaterial and Impertinent Allegations Should be**  
2           **Stricken From Its Counterclaim.**

3           On motion, “[t]he court may strike from a pleading ... any redundant,  
4 immaterial, impertinent, or scandalous matter.” Fed. R. Civ. P. 12(f) (2007). The  
5 Ninth Circuit has defined immaterial matter as “that which has no essential or  
6 important relationship to the claim for relief or the defenses being pleaded.”  
7 *Fantasy, Inc. v. Fogerty*, 984 F.2d 1524, 1527 (9th Cir. 1992) *rev’d on other*  
8 *grounds* 510 U.S. 517 (1994). “Impertinent matter consists of statements that do  
9 not pertain, and are not necessary to the issues in question.” *Id.* “Superfluous  
10 historical allegations are the proper subject of a motion to strike,” especially where  
11 they “create[] serious risk of prejudice[,] delay and confusion of the issues.” *Id.* at  
12 1527-28.

13           Rather than provide even the most basic factual allegations in support of its  
14 claim for intentional interference with contractual relations, West-ward fills its  
15 counterclaim with irrelevant and inflammatory claims disparaging Mutual’s  
16 manufacturing practices. West-ward alleges, *inter alia*, that Mutual’s “raw material  
17 is sourced from a Sanmar facility in ... India[] that is not GMP (good  
18 manufacturing practices) compliant [and] has never been inspected by the FDA,”  
19 and that Mutual’s “advertised specifications, label claims and expiry date cannot be  
20 trusted.” Counterclaim at ¶¶ 13-14. These allegations have no essential or  
21 important relationship to any of the five elements that West-ward must prove in  
22 order to succeed on its counterclaim for intentional interference with contractual  
23 relations. *Pacific Gas & Electric Co., v. Bear Stearns & Co.*, 50 Cal.3d 1118, 1126  
24 (1990).

25           Not only are such matters irrelevant to the issues in question, they appear to  
26 have been included solely to sling mud in an attempt to prejudice the Court from  
27 the merits of Mutual’s main action, and, if allowed to stand, potentially open the  
28 door to irrelevant, time consuming and unduly burdensome discovery requests.

1 Therefore, the Court should strike paragraphs 13 and 14 from West-ward's  
2 counterclaim pursuant to Fed. R. Civ. P 12(f).

3 **C. West-ward's Eighteenth Affirmative Defense Should be Stricken**  
4 **From Its Answer.**

5 Likewise, West-ward's Eighteenth Affirmative Defense, and paragraphs 1  
6 through 5 in support thereof, should be stricken from its answer. First, Mutual has  
7 found no precedent for the defense of "behavior antithetical to acceptable  
8 commercial practice." Answer at 20:19-20. Second, to the extent that West-ward  
9 argues that Mutual is not entitled to relief because it has acted inequitably, West-  
10 ward's Eighteenth Affirmative defense is redundant of its Fourth Affirmative  
11 Defense, "unclean hands." Answer at 19:3-5. Third, paragraph 3 of West-ward's  
12 Eighteenth Affirmative Defense involves the same subject matter as paragraphs 13  
13 and 14 of its counterclaim, and is immaterial and impertinent for the reasons  
14 discussed in Section III(B), *supra*. Fourth, this defense and the supporting  
15 allegations are included solely to cast Mutual in an unfavorable light, and, if  
16 allowed to stand, would prejudice Mutual and open the door to irrelevant and  
17 unduly burdensome discovery requests. Therefore, they should be stricken  
18 pursuant to Fed. R. Civ. P. 12(f).

1     **V.     CONCLUSION**

2             For the foregoing reasons, Mutual respectfully requests that the Court  
3     dismiss West-ward's counterclaim pursuant to Fed. R. of Civ. P. 12(b)(6) for failure  
4     to state a claim or, in the alternative, strike paragraphs 13 and 14 of West-ward's  
5     counterclaim. Mutual further respectfully requests that the Court strike West-  
6     ward's Eighteenth Affirmative Defense under Fed. R. Civ. P. 12(f).

7     Dated:   October 9, 2009             COOLEY GODWARD KRONISH LLP

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